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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE STATIC RANDOM ACCESS MEMORY (SRAM) ANTITRUST LITIGATION

This Document Relates to:

ALL DIRECT AND INDIRECT PURCHASER ACTIONS

Master File 4:07-md-01819-CW

MDL NO. 1819

DEFENDANT CYPRESS SEMICONDUCTOR CORPORATION'S MOTIONS IN LIMINE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES, RULES AND REGULATIONS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at a date and time to be selected by the Court, in the United States District Court for the Northern District of California, Courtroom 2, 1301 Clay Street, Oakland, California, before the Honorable Claudia Wilken, Defendant Cypress Semiconductor Corporation ("Cypress") will move this Court, pursuant to the Federal Rules of Evidence, for an Order *in limine* excluding certain evidence from the trial of this matter and prohibiting Plaintiffs from making reference to any excluded evidence at trial through argument, questioning, or otherwise.

This motion is based upon this Notice of Motion; the Memorandum of Points and Authorities; the Declaration of Gary A. Winters; the complete files in this action; argument of counsel; and such other further matters as the Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. MOTION TO EXCLUDE EVIDENCE OF THE DRAM CONSPIRACY AND THE DRAM INDUSTRY

Plaintiffs seek to introduce guilty pleas entered by Samsung and Hynix Semiconductor, as well as various executives of these companies, in the U.S. Department of Justice's DRAM criminal investigation. In the draft Trial Brief they submitted on November 16, 2010, Plaintiffs contend that this evidence of "other crimes" is relevant and admissible under Federal Rule of Evidence 404(b) for three specific purposes: to show that the same people at Samsung who had responsibility for DRAM had responsibility for SRAM; to show the background and development of the alleged SRAM conspiracy; and to rebut defendants' experts' claims that collusion was not feasible in the SRAM industry, given the purported similarity between the DRAM and SRAM industries.

The guilty pleas (and any other evidence referencing the pleas or the existence of the DRAM conspiracy, such as testimony, interrogatory answers, or admissions) should be excluded for several reasons. *First*, evidence about the existence of the DRAM conspiracy is inadmissible against Cypress because that conspiracy was not the "other wrong" of Cypress, a company that

never made DRAM and was never implicated in the conspiracy. In other words, any theoretical legitimate purpose for this evidence under Rule 404(b) relates to the identity, knowledge or intent of the *perpetrator* of the previous conduct, not a party who had no involvement in the prior bad act. *Second*, the DRAM conduct is not "inextricably intertwined" with the SRAM evidence, and thus cannot be admitted as part of "res gestae" of the case. Plaintiffs have not so much as hinted that they would be unable to coherently explain the alleged SRAM conspiracy without reference to the DRAM conspiracy. Nor could they make such a suggestion, as the evidence shows substantial differences between the two industries and the conduct involved. *Third*, evidence of the DRAM conspiracy cannot rebut defendants' experts' testimony. Although Plaintiffs assert that there are "significant similarities" between the DRAM and SRAM industries (Pl. Draft Trial Br. at 7), their own witness proffered as an industry expert testified that they are "extraordinarily different. *Fourth*, even if the DRAM guilty pleas are admissible for a permitted purpose under Rule 404(b) as to Samsung, they should be excluded under Rule 403 as unfairly prejudicial to Cypress.

Plaintiffs also have placed on their exhibit list scores of documents related to the DRAM industry, such as emails between DRAM suppliers concerning DRAM prices and customers. Presumably Plaintiffs believe that if they can inform the jury of the DRAM conspiracy through the guilty pleas, they also may introduce under Rule 404(b) evidence of conduct in the DRAM industry that purportedly illustrates how the DRAM conspirators operated. But if evidence of the DRAM guilty pleas is inadmissible, evidence (whether documentary or testimonial) of DRAM information exchanges is surely irrelevant, not to mention confusing and misleading. And even if the Court were to admit the DRAM guilty pleas, the evidence of conduct in the DRAM industry should be excluded under Rule 403 as cumulative and likely to confuse and mislead the jury.

For these reasons, all evidence related to DRAM — both evidence of the admitted conspiracy, and evidence of communications between alleged coconspirators concerning the product — should be excluded from this trial, and Plaintiffs should be precluded from asking

questions of lay and expert witnesses, making arguments, or otherwise referencing the DRAM conspiracy or the DRAM industry.

A. Evidence Of The DRAM Conspiracy Is Not Admissible Against Cypress Because Cypress Had No Involvement In Those Prior Crimes.

In the first instance, evidence of the DRAM conspiracy, as shown through the guilty pleas or any other evidence, cannot be admissible against Cypress. It has been undisputed from the beginning of this litigation that Cypress never produced DRAM and was never implicated in the DRAM conspiracy. Evidence of a prior bad act, if admissible under Rule 404(b) at all, is admissible ***only*** against the defendant who committed the prior act. *See United States v. Erickson*, 75 F.3d 470, 479 (9th Cir. 1996) ("Evidence of a defendant's prior bad acts is admissible only against that defendant[,]" and not against any codefendants) (citing *Huddleston v. United States*, 485 U.S. 681, 685 (1988)). Plaintiffs appear to suggest that because some of the same personnel were involved in both the DRAM and SRAM business, the DRAM guilty pleas and other evidence is admissible as "plan" or "modus operandi" evidence. While Plaintiffs have not carried their burden of establishing the admissibility of this evidence with respect to Samsung, such a theory of admissibility could never support the admission of this evidence against Cypress. In evaluating prior bad acts to prove "common plan or scheme" the Third Circuit has explained:

> Ordinarily, when courts speak of common plan or scheme, they are referring to a situation in which the charged and uncharged [acts] are part of a single series of events. In this context, evidence that the defendant was in the uncharged act may tend to show a motive for the charged act, and hence establish the commission of the act, the identity of the actor, or his intention.

Becker v. Arco Chem. Co., 207 F.3d 176, 189 (3d Cir. 2000) (quoting *J & R Ice Cream Corp., v. California Smoothie Licensing Corp.*, 31 F.3d at 1259, 1268 (3d Cir. 1994)). *See United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979) ("Something more than repeated performance of the same class of crimes is required in evidencing a 'design' or 'plan' which, if proved, may

raise the inference that the accused was the perpetrator of the crime in question."). *See also United States v. Robinson*, 161 F.3d 463, 467 (7th Cir. 1998) ("*Modus operandi*" evidence "may be properly admitted pursuant to Rule 404(b) to prove identity."). Thus, consistent with the general principles underlying Rule 404(b), "common scheme" or "plan" evidence may only be admissible under Rule 404(b) against the party who committed the prior act in order to prove that the party was the perpetrator of the alleged conduct (*i.e,* identity) or to help prove the defendant's intent, motive or knowledge. Such evidence can have no conceivable relevance at all as to a party who was not involved in the prior conduct. Accordingly, Rule 404(b) does not support the admission of this evidence against Cypress.

Plaintiffs further suggest because DRAM is a "related industry with many of the same companies as major players," the DRAM conspiracy is material to showing the "background and development of the SRAM conspiracy." Pl. Draft Trial Br. at 7. To admit other acts evidence under this theory, however, plaintiffs bear the burden of showing that the DRAM evidence is "inextricably intertwined" with the SRAM case. *See United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-1013 (9th Cir. 1995). They have not done so here, nor could they. Plainly, the DRAM guilty pleas and other evidence of the DRAM conspiracy is not to necessary "offer a coherent and comprehensible story" (*Vizcarra-Martinez*, 66 F.3d at 1012) regarding commission of the alleged conduct in the SRAM industry. Nothing about this evidence suggests that understanding the background of the DRAM conspiracy is essential to understanding the alleged conduct in SRAM. Nor is there any indication that the DRAM conspiracy evolved into, or was a direct predecessor of, the SRAM conspiracy.

All plaintiffs have said is that the two products are "related" — a proposition that, even if true in the abstract sense that both are semiconductor chips, has no relevance where the evidence clearly shows that the two markets are significantly different from one another. Indeed, contrary to plaintiffs' glib assertion that there are "significant similarities between the SRAM industry and the DRAM industry" (Pl. Draft Trial Br. at 7), plaintiffs' own industry expert, Jim Handy, in fact said the exact opposite:

> "The NAND and DRAM market ***are extraordinarily different*** from the SRAM market . . . And so, you know, I could say that SRAM and NOR flash are very similar to each other, but ***the other markets really had absolutely no bearing on what goes on in SRAM.***"

Handy Tr. 172:23-173:5 (emphasis added). Moreover, witnesses that plaintiffs have deposed in this case who participated in the DRAM conspiracy testified that DRAM, unlike SRAM,

> "is a highly commoditized product, far more volume in respect to the overall revenue generation that it provides to the company, [involves] a different set of customers, a different sales process, a different . . . designing process. Where DRAM is a very quick, high turn rate process, SRAM takes a long design cycle. Its pricing characteristics are far different. It's not priced on a twice-a-month or monthly basis. It's priced on a quarterly or yearly basis. ***And they are two separate entities altogether***."

McBroom Tr. 33:5-9, 34:11-16 (emphasis added). Similarly, OS Kwon testified on behalf of Samsung that "[i]n case of DRAM, they have lots of customer using same part number in the same period with a similar volumes. But in the SRAM area, we have lots of different part numbers, and customer, even customer use in the same period, they use different part number products[.]" Kwon 30(b)(6) Tr. 304:23-305:6.

Furthermore, the witnesses who were involved in the DRAM conspiracy have testified that their conspiratorial actions were limited to DRAM only. McBroom testified that "in terms of specific price range discussions it was DRAM only," even though he had some responsibility for SRAM. McBroom Tr. 88:22-89:2; *see also* McBroom Tr. 26:7-9 ("And during the '99 to 2000 time frame that you are talking about we also had some contact with our competitors for DRAM only."). Kun Chul (KC) Suh, who pled guilty in DRAM and served a prison sentence, testified that he "never contacted competitors for SRAM issue," was never aware of any coworkers contacting a competitor to obtain SRAM prices, and did not remember ever seeing any emails suggesting that a coworker had obtained SRAM prices from a competitor. Suh Tr. 95:14-98:5.

In view of the differences between DRAM and SRAM, plaintiffs' contention that some of the individuals who were responsible for DRAM were also responsible for SRAM, *see* Pl. Draft Trial Br. at 6, adds nothing and certainly does not support the assertion that the DRAM and SRAM are so "inextricably intertwined" that plaintiffs cannot offer a "coherent and comprehensive story" about SRAM without reference to DRAM. *Vizcarra-Martinez*, 66 F.3d at 1012. The guilty pleas do not show this fact, as plaintiffs oddly suggest; they are merely pleas in the DRAM case, and make no reference to the individual's responsibilities for SRAM. To the extent plaintiffs mean that a plea of guilty by a person who had responsibility for both DRAM and SRAM suggests the person's participation in an SRAM conspiracy, that is precisely the inference that Rule 404(b) precludes: this is nothing more than a claim that the conduct in DRAM shows a propensity to fix prices, so the jury should infer that the person fixed prices in SRAM. In the absence of any other evidence of similarity between the DRAM and SRAM conduct, there is no basis for admitting this highly inflammatory other acts evidence.[1]

Plaintiffs' citation to *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000), shows how far off the mark they are. In *Andreas*, an appeal from a conviction for fixing lysine prices, the court determined that evidence of the defendant's prior involvement in a conspiracy to fix the prices of citric acid was admissible not because it was offered for a permissible purpose under Rule 404(b), but because the prior acts were "intricately interwoven with the facts of the charged crime that to omit the evidence relating to it would lead to confusion or leave an unexplainable

[1] While this Court observed in denying the defendants' motion to dismiss that the DRAM guilty pleas "support an inference of a conspiracy in the SRAM industry," *In re SRAM Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008), the Court at the time did not have the benefit of the record that exists now. Moreover, for the same reasons that the significant differences between SRAM and DRAM preclude their admission as part of the "res gestae" of the SRAM case, this evidence is also inadmissible as "common plan or scheme" evidence against Samsung. *See Hirst v. Gertzen*, 676 F.2d 1252, 1262 (9th Cir. 1982) (when prior acts evidence is offered on the theory that those acts show a consistent "plan" or "modus operandi," there must be "a very close similarity between the prior acts and the conduct sought to be established."); *United States v. Hill*, 953 F.2d 452, 457 (9th Cir. 1991) (evidence of prior criminal acts may be relevant to show the background and development of the conspiracy only where "the prior crime and the charged crime were identical and involved the same individuals").

gap in the narrative of the crime." *Id*. at 665. The acts were "part and parcel of the charged crime itself; they simply [were] not 'other'." *Id*. In *Andreas*, there was evidence that the conspirators *explicitly* discussed using trade associations in the lysine conspiracy in the same way they had in the citric acid conspiracy, and that the defendant's employer had considered the lysine and citric acid conspiracies part of the same "master plan to control prices." *Id*. Nothing like this even remotely exists here: there is not a shred of evidence connecting the workings of the DRAM conspiracy to any conduct in the SRAM industry. Plaintiffs' use of the DRAM conspiracy evidence is for little more than showing that Samsung and other companies that were in both the DRAM and SRAM industries must have fixed prices in SRAM because they did so in DRAM. That is precisely what Rule 404(b) prohibits.

Plaintiffs' last argument, that "the DRAM guilty pleas are relevant to rebut the defendants' experts' claims that, as a matter or [sic] economics, the SRAM industry was not an industry in which collusion was feasible" (Pl. Draft Trial Br. at 7), fails for the same reasons as the others. Although plaintiffs write in their brief that the "significant similarities" between the DRAM and SRAM industries support the feasibility of price-fixing in the SRAM industry, their own industry expert has said that the SRAM and DRAM markets are "extraordinarily different." These differences manifest themselves in a number of ways. For example, DRAM and SRAM cannot function as substitutes. Corrected Expert Report of Michael J. Harris (Harris Rep't) ¶ 24 (May 6, 2010). There is a "spot market" for DRAM, which does not exist with SRAM and which makes price-fixing more feasible. *See* Noll Class Cert. Tr. 174:1-6. DRAM is sold to "a different set of customers" than SRAM is. McBroom Tr. 33:5-9. DRAM is priced on a "twice-a-month or monthly basis," whereas SRAM is priced on a "quarterly or yearly basis." McBroom Tr. 34:11-16. DRAM is far more commoditized, with "lots of customer using same part number in the same period with a similar volumes," whereas SRAM has "lots of different part numbers[.]" Kwon 30(b)(6) Tr. 304:23-305:6. In sum, the economic factors that characterize DRAM are not the factors that characterize the SRAM market**.** The feasibility of collusion in a market that, as Mr. Handy said, "really had absolutely no bearing on what goes on in SRAM"

(Handy Tr. 173:3-5), can prove nothing about the feasibility of collusion in the SRAM market.

B. The DRAM Evidence Is Unfairly Prejudicial To Cypress.

Even if other crimes evidence is admissible under Rule 404(b), it may be excluded under Rule 403 if the danger of unfair prejudice substantially outweighs its probative value. *United States v. Montgomery*, 150 F.3d 983, 1001 (9th Cir. 1998); *United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1400-01 (9th Cir. 1991). If the Court were to determine that the DRAM conspiracy evidence is admissible only against Samsung but not Cypress (as was the case in the *HFCS* litigation), or if it were to determine that the evidence is admissible against both defendants, the risk to Cypress of prejudicial spillover supports excluding it altogether to ensure that Cypress obtains a fair trial. It is difficult to imagine a body of evidence more prejudicial to Cypress in this case charging an antitrust conspiracy than evidence that its co-defendant participated in a prior antitrust conspiracy involving a different semiconductor product. "[E]ven if Rule 404(b) evidence is properly admitted against one defendant in a joint trial, … the district court must consider whether the evidence may have a 'spillover' effect that could deprive the other defendants to whom the evidence does not apply of their right to a fair trial." *United States v. Johnson-Dix*, 54 F.3d 1295, 1308 (7th Cir. 1995); *See United States v. DeRosa*, 670 F.2d 889, 898 (9th Cir. 1982) (courts "must be wary of situations where a jury might impute the guilt of some defendants to other defendants"); *accord, e.g.*, *United States v. Briscoe*, 896 F.2d 1476, 1498 (7th Cir. 1990) ("[I]n joint trials the court must consider, and remain particularly sensitive to the possibility that the prejudicial effect of evidence admissible only as to only one or a few defendants may have a 'spillover' effect on the jury's consideration of the government's case against defendants to whom the evidence does not apply.").

In *In re High Fructose Corn Syrup Antitrust Litig.*, 293 F. Supp. 2d 854 (C.D. Ill. 2003), the court faced a situation very similar to the one here. Three defendants, ADM, Cargill and Staley, were charged with participating in a conspiracy to fix HFCS prices. ADM had participated in prior conspiracies to fix lysine and citric acid prices, but neither Cargill nor Staley had been involved in either conspiracy. *See In re High Fructose Corn Syrup (HFCS) Antitrust*

Litig., 295 F.3d 651, 661 (7th Cir. 2002); *In re Citric Acid Antitrust Litig.*, 191 F.3d 1090 (9th Cir. 1999). Evidence concerning the prior conspiracies was not admissible to show that ADM probably had fixed HFCS prices, as that would constitute the use of prior crimes evidence for the purpose expressly prohibited under Rule 404(b) (*see HFCS*, 295 F.3d at 664), but the trial court held that some of the evidence was admissible *against ADM only* for the purposes permitted under Rule 404(b). 293 F. Supp. 2d at 862; *see also In re HFCS*, 361 F.3d 439, 440 (7th Cir. 2004) ("Very damaging evidence arising from criminal proceedings against ADM would be admissible against ADM but not against the other defendants."). This created a danger, however, of "significant prejudice to the non-ADM Defendants due to guilt by association or spillover." *Id*. The court found "far from frivolous" the suggestion that a limiting instruction could not cure the prejudice (*id*.), and expressed a strong preference for seating two juries — one to hear all the evidence, including the evidence admissible only against ADM, and one to hear everything but the 404(b) evidence. *Id*. The Seventh Circuit concluded that this was a perfectly permissible method of avoiding the prejudice to the non-ADM defendants. *HFCS*, 361 F.3d at 441.[2]

Moreover, to counter this evidence, Cypress would have to conduct its own "trial within a trial" to demonstrate that it had nothing to do with DRAM and did not participate in the conspiracy — an exercise that is bound to confuse and mislead the jury, and needlessly extend the proceedings. As the district court recognized in *HFCS*, 293 F. Supp. 2d at 862, a limiting instruction can hardly protect one defendant from the effect of evidence that a co-defendant participated in a prior price-fixing conspiracy. As the court in *High Fructose Corn Syrup* acknowledged, "[i]n a joint trial, the only possible way to ensure that [Cypress] receive[s] a fair trial is to substantially limit the Plaintiffs' proof in the presentation of their case pursuant to Rule 403." 293 F. Supp. 2d at 863.

C. The Court Should Also Exclude Documents And Testimony Relating To The

[2] The defendants had sought a severance under Rule 21 as a remedy, but the district court believed that a severance was not appropriate under the circumstances. 293 F. Supp. 2d at 863. As Cypress explains in its separate Trial Brief, a severance would be warranted in this case in the event evidence of the DRAM conspiracy is held to be admissible against Samsung but not Cypress. In the alternative, Cypress would support the two-jury approach that the Seventh Circuit sanctioned in *HFCS*.

DRAM Industry.

Plaintiffs have not only marked the DRAM guilty pleas and other evidence directly establishing the DRAM conspiracy as exhibits, they also have listed hundreds of DRAM-related communications on their exhibit list and designated deposition testimony about the DRAM industry. If the Court excludes evidence of the DRAM conspiracy, all other evidence concerning DRAM, such as documents constituting or referencing information exchanges, would have no relevance and should be excluded. Fed. R. Evid. 402. Moreover, if the jury is not to be informed of the DRAM conspiracy, then other evidence concerning the DRAM industry will only confuse and mislead them. The DRAM-related testimony and documents reflect the fact that there was an admitted conspiracy in that industry. Without the guilty pleas to inform the background of the DRAM conspiracy, this other evidence might be wrongly interpreted by the jury as reflecting activities in the SRAM industry. The probative value of this "highly-charged" evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Fed. R. Evid. 403.

Finally, even if the Court admits the DRAM guilty pleas, plaintiffs' other DRAM evidence should be severely restricted, if not eliminated altogether, to avoid additional prejudice, the cumulative presentation of evidence, and jury confusion. The hundreds of DRAM exhibits plaintiffs have marked suggest that plaintiffs are prepared to put on an entirely collateral case about the DRAM industry. That can only lead to massive confusion as the jury attempts to sort out the DRAM evidence from the SRAM evidence. It also runs the risk of prejudicing Cypress further by unfairly suggesting that DRAM-related communications among the conspirators in that industry bear some relationship to SRAM-related communications.

II. MOTION TO EXCLUDE INTERROGATORY ANSWERS AND ADMISSIONS OF SETTLING CODEFENDANTS, AND FOR A LIMITING INSTRUCTION REGARDING SAMSUNG'S ANSWERS

Plaintiffs have designated certain responses to interrogatories and requests for admission (collectively, "Discovery Responses") submitted by settling codefendants and Samsung. The

Discovery Responses of settling codefendants are inadmissible hearsay as to both Cypress and Samsung, and therefore should be excluded from the trial altogether.[3] The Discovery Responses submitted by Samsung may be admissible against Samsung, but they are inadmissible hearsay against Cypress. Admitting Samsung's Discovery Responses in a joint trial would be highly prejudicial to Cypress and is a basis for severance of the defendants, as set forth in Cypress's separately filed trial brief. But if the Court proceeds with a joint trial, it should give a limiting instruction directing the jury not to consider Samsung's Responses as evidence against Cypress.

A. Discovery Responses Are Admissible Only Against The Party Making Them

Under Federal Rule of Civil Procedure 33(c), interrogatory answers "may be used to the extent allowed by the Federal Rules of Evidence." In general, a party's responses to an opponent's interrogatories constitute the admission of a party opponent under Federal Rule of Evidence 801(d)(2)(A). *Tamez v. City of San Marcos*, 118 F.3d 1085, 1098 (5th Cir. 1997). The same is true of responses to requests for admission propounded under Federal Rule of Civil Procedure 36.

Statements admissible under Rule 801(d)(2)(A) may, however, be introduced only against the declarant, and not against other parties. *See*, *e.g.*, *United States v. Sausa-Martinez*, 217 F.3d 754, 761 (9th Cir. 2000) (holding that district court was obligated to include limiting instruction that codefendant's statements were hearsay as to defendant and were not admissible against him); *United States v. Hay*, 122 F.3d 1233, 1236-37 (9th Cir. 1997) (statement of defendant admissible against him under Rule 801(d)(2)(A) held not admissible against another defendant); *United States v. Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979) (same); *Becerra v. Asher*, 105 F.3d 1042, 1048 (5th Cir. 1997) ("[d]eemed admissions by a party opponent cannot be used against a co-party"); *United States v. Pedroza*, 750 F.2d 187, 202 (2d Cir. 1984) (statement by one defendant, which was admissible against him under Rule 801(d)(2)(A), was not admissible against other defendants); *United States v. Payden*, 622 F. Supp. 915, 919

[3] Certain of the Discovery Responses also relate to the DRAM conspiracy, and as such are inadmissible also on the ground that all evidence relating to that conspiracy has no relevance to the claims against Cypress. *See* Point I, *supra.*

(S.D.N.Y. 1985) (court must determine admissibility of codefendant's statements as if codefendants were being tried separately); *In re Leonetti*, 28 B.R. 1003, 1009 (E.D. Pa. 1983) ("the admission of one party to an action is not binding upon a co-defendant").

The only circumstances in which an admission of one party may be introduced against another party is if the admission falls within another hearsay exception. *See* 8A Charles A. Wright, et al., Federal Practice and Procedure § 2180, at 340 (2006). But no other exception applies here. Plaintiffs cannot avail themselves of Rule 801(d)(2)(B) (statement in which a party manifests adoption or belief in truth) because Cypress has done nothing to manifest an adoption or belief in the truth of the matters set forth in any of the codefendants' Discovery Responses. They cannot use Rule 801(d)(2)(E) (statement of a coconspirator during the course of and in furtherance of the conspiracy) because the Responses were provided in litigation, long after the alleged conspiracy ended. Rule 804(b)(3) does not apply, as corporations cannot be "unavailable," and the Responses contain no statement that "so far tend[s] to subject the declarant to civil or criminal liability." *See generally Williamson v. United States*, 512 U.S. 594, 599 (1994) (rule applies to statements that are self-inculpatory).

Plaintiffs may seek refuge in Rule 807, the "residual" hearsay exception, but the Ninth Circuit has made clear that the rule is "to be used rarely and in exceptional circumstances." *Fong v. American Airlines, Inc.*, 626 F.2d 759, 763 (9th Cir. 1980); *accord United States v. Valdez-Soto*, 31 F.3d 1467, 1477 (9th Cir. 1994). To be admissible under Rule 807, the evidence must be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. The Discovery Responses come nowhere close to meeting this requirement. Many of the settling codefendant Responses simply provide basic information about the companies' SRAM businesses — evidence that Plaintiffs did obtain, or could have obtained, from other sources. *See United States v. Carreno*, 363 F.3d 883, 889 (9th Cir. 2006) (evidence not admissible under Rule 807 if it is cumulative of other evidence). As for the Responses, such as Samsung's, that identify meetings and communications among SRAM producers, Plaintiffs deposed many of the individuals whose activities were described

(such as David Bagby, John Bugee, Oomer Serang, H.K. Jeong, J.B. Ra, and O.S. Kwon), and had the opportunity to depose others during the discovery period. *See id*.[4] Plaintiffs are not without the means to prove the matters contained in the Discovery Responses, and to the extent they are, it is a problem of their own making.

B. The Settling CoDefendants' Responses Should Be Excluded, And The Court Should Issue A Limiting Instruction As To Samsung's Responses

The foregoing analysis leads to the conclusion that the settling codefendants' Discovery Responses are not admissible for any purpose against either Cypress or Samsung, and thus should be excluded from the trial altogether.

Samsung's Discovery Responses may be admissible *against Samsung* as admissions of a party-opponent but, for the reasons stated above, they are not admissible against Cypress. Cypress is entitled to a limiting instruction to ensure that the jury understands the limited purpose for which the Samsung Discovery Responses may be admitted. *See*, *e.g.*, *Sauza-Martinez*, 217 F.3d at 761 (limiting instruction needed to ensure that one party's admissions were not used against another). [5]

III. MOTION TO PRECLUDE SAMSUNG FROM SUBMITTING QUESTION 5 ON ITS PROPOSED VERDICT FORM AND ARGUING THE CONTENTS TO THE JURY

[4] This readily distinguishes the instant case from *In re EPDM Antitrust Litigation*, 681 F. Supp. 2d 141 (D. Conn. 2009), where the court admitted one party's interrogatory answers against a co-party. There, however, the answering party's witnesses had invoked the Fifth Amendment privilege, leaving the plaintiffs with no other evidence on the subjects discussed in the answers. *Id*. at 151. Moreover, the fact that Samsung is a leniency applicant under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), and seeks limited civil liability upon a post-trial showing of satisfactory cooperation with Plaintiffs, means that the Responses do not satisfy Rule 807's requirement that the evidence have "circumstantial guarantees of trustworthiness." Even as Samsung is defending the case on liability and damages, it in effect is also functioning as a cooperating witness that may be motivated by a desire to assist Plaintiffs for its own ends. *Cf. United States v. Bernal-Obesom*, 989 F. 2d 331, 332 (9th Cir. 1993) ("criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom") (internal quotation omitted).

[5] As explained in Cypress's Trial Brief, admission of Samsung's answers is another basis for severance.

Samsung asserts in its trial brief that, as the recipient of amnesty in connection with the U.S. Department of Justice's now-closed investigation of SRAM, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) will entitle Samsung to reduced liability in the event there is a judgment against it. Specifically, Samsung asserts that, if it is found to have provided "satisfactory cooperation" under ACPERA, it can be liable only for damages attributable to its own sales (as opposed to the sales of all parties found to be in the conspiracy, as would be the ordinary rule under joint and several liability), and that such damages may not be trebled. Samsung claims that this has two implications: First, it seeks a special verdict form that directs the jury to separately calculate the total direct purchaser class damages (if any) attributable to the entire conspiracy and the portion of damages attributable to Samsung's own sales. Second, it alerts the Court that if the jury finds liability and damages, the Court must conduct a post-trial hearing at which it must assess the level of Samsung's cooperation in order to determine whether Samsung is eligible for the damages reductions provided by ACPERA.

At the outset, there is a substantial question whether Samsung can possibly obtain "cooperator" status under ACPERA after contesting liability at trial and offering evidence denying the existence of a conspiracy. But putting aside that threshold legal question, Samsung's request for special consideration before the jury — in the form of a special verdict form that asks the jury to calculate damages attributable only to Samsung's sales — is not legally required and would severely prejudice Cypress.

Samsung asserts that its special verdict form is compelled by the Seventh Amendment right to a jury trial. But there is considerable doubt whether the Seventh Amendment requires that the jury reach a verdict on the damages attributable to Samsung in order for the Court to have the power to reduce Samsung's liability to single damages under ACPERA. The statute merely provides a basis for the Court to eliminate joint and several liability for a cooperating party, following a jury verdict awarding damages, if the Court determines after trial that certain eligibility requirements are satisfied.[6] So long as (1) the jury verdict identifies which parties

[6] As Samsung argues, the Court makes the determination of satisfactory cooperation after the jury determines liability and damages. *Accord In re TFT-LCD Antitrust Litig.*, 618 F. Supp. 2d (cont'd)

were in the conspiracy, and (2) there is evidence of each participating member's sales, the Court can simply break out the damages attributable to Samsung's sales alone. A reduction to single damages on that basis would function like a remittitur, which permits a court to reduce a damage award based upon legal and factual deficiencies in the case.[7] In addition, ACPERA also may be similar to a court's reduction in a punitive damages award in response to a constitutional challenge that the jury award exceeded due process limitations. In those circumstances, courts routinely modify the damages award based on factual and legal determinations required under the Due Process Clause. *See*, *e.g.*, *Cortez v. Trans Union LLC*, 617 F.3d 688, 717 (3d Cir. 2010) (where "a court must reduce a damages award to avoid a denial of due process[,] . . . the award is reduced as a matter of law and there is no interference with the Seventh Amendment right to have a jury make findings of fact"). Accordingly, it may be the case that in the event of a damages award by a jury, the Court may properly determine Samsung's eligibility for limited damages under ACPERA and then, if it finds Samsung satisfies ACPERA's requirements, order a reduction of the damages award imposed by the jury based on submissions reflecting Samsung's total SRAM sales figures for the alleged conspiracy period.

But even if Samsung is entitled to a jury determination of ACPERA-limited damages, its proposed special verdict form should be rejected because it would unduly and severely prejudice Cypress in a joint trial. In essence, Samsung wishes to inform the jury through a special verdict form that, if it considers damages, it must separately consider only those damages attributable to Samsung's sales, while leaving the jury to consider the sales of *all conspirators* when determining whether it should award damages as to Cypress. This form of verdict — and any argument Samsung might make to the jury to alert them to it — would send a clear signal to the

1194, 1196 (N.D. Cal. 2009) ("the language of ACPERA suggests that the Court's assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages").

[7] The ability of the Court to identify the damages attributable to Samsung, so that the reduction of joint and several liability is essentially a mechanical exercise, makes this situation somewhat different from a remittitur, and avoids the Seventh Amendment issues associated with that procedure. *See generally Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (*per curiam*) (discussing procedure for ensuring that remittitur does not violate Seventh Amendment jury trial right).

jury that Samsung occupies some privileged status as compared to Cypress. Confronted with the unmistakable message from the special verdict form that Samsung is responsible for paying damages only for its own sales affected by the alleged conspiracy, while Cypress must pay damages for the sales of itself and all other alleged coconspirators (other than Samsung), the jury would be prone to incorrectly and unfairly conclude that Cypress is more culpable than Samsung. The likelihood of this misimpression is particularly high if the Court were to grant Samsung's motion to exclude all evidence related to Samsung's status as an amnesty applicant and the efforts it has undertaken to limit its exposure to damages pursuant to ACPERA.[8] Moreover, Samsung's verdict form would create a risk of prejudice to Cypress even *before* Samsung knows whether it will qualify under ACPERA for reduced damages.

In the event the Court agrees with Samsung that a jury determination of the damages attributable to Samsung alone is required, there are several options. One possible remedy is to have the jury determine damages attributable to all alleged conspirators, then have the Court make the ACPERA determination, and then, if the Court finds Samsung eligible for reduced damages, have the jury make a separate determination of the damages attributable only to Samsung. A second possible remedy is to have the special verdict form ask the jury to separately identify the damages allegedly attributable to Cypress as well, as a means of balancing the presentation and not conveying any unintended message that Cypress is some way more culpable or blameworthy.

If the Court were to deem either of these unworkable or inadvisable, the only alternative remedy is severance of the claims against Samsung and Cypress, or the use of separate juries to

[8] Cypress anticipates that there may be circumstances in which it would be essential to Cypress's defense to introduce evidence of Samsung's cooperation with Plaintiffs, particularly during cross-examination of Samsung witnesses. *See*, *e.g.*, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (promise of non-prosecution in exchange for cooperation was "relevant to [witness's] credibility and the jury was entitled to know of it"); *United States v. Schonenberg*, 396 F.3d 1036, 1043 (9th Cir. 2005) ("Because a witness who is a party to a forward-looking cooperation agreement, with truthfulness to be determined by the government, has a motivation to satisfy the government, the defendant is entitled through cross examination to prove to the jury that the witness has this incentive and that there may be reason to question the witness' credibility."). Cypress will address this issue in greater detail in response to Samsung's anticipated motion *in limine* regarding its status as an amnesty applicant.

decide the claims against Samsung and Cypress. Cypress has argued in its Trial Brief that, if the Court were to allow evidence of the DRAM conspiracy to come in against Samsung, the prejudicial spillover effect against Cypress would be so great that Cypress would be entitled to a severance under Fed. R. Civ. P. 21 or a separate jury as outlined in *In re High Fructose Corn Syrup Antitrust Litigation*, 361 F.3d 439 (7th Cir. 2004). Plaintiffs are entitled to present their case, but neither they nor Samsung may *unfairly* convey any messages about Cypress that are not based solely on relevant evidence.

Whatever laudable goals ACPERA sought to advance, it cannot have been intended to operate as Samsung would have it here — to allow the amnesty applicant to fight liability to the end, and then obtain a special verdict form that suggests (without explanation) that it occupies a privileged status vis-à-vis another defendant who has just as vigorously defended the case, even before the Court makes any determination of the cooperation that is a prerequisite for reduced damages. Here, moreover, it would be especially ironic if Samsung could obtain this special treatment when it was Samsung that pled guilty to a DRAM price-fixing conspiracy and then, in an effort to limit its criminal exposure in DRAM, triggered an SRAM investigation which the DOJ ultimately closed. For these reasons, the Court should adopt one of the three remedies outlined above.

IV. MOTION TO EXCLUDE TESTIMONY AND ARGUMENT THAT PLAINTIFFS' DAMAGES EXPERTS' ANALYSES SUPPORT AN INFERENCE OF CONSPIRACY

In their Consolidated Opposition to Cypress' Motion for Summary Judgment (filed Aug. 24, 2010), Plaintiffs hinted that one piece of evidence that they may rely upon to show the existence of a conspiracy was the analyses of their damages experts (Drs. Armando Levy and Mark Dwyer) purportedly showing that all sellers' SRAM prices were systematically inflated above a competitive level during the damages periods.[9] Plaintiffs asserted that the Levy and

[9] The DP and IP Plaintiffs have different damages periods. The DPs claim the period is October 1999 to December 2001, while the IPs claim the period is January 1998 to December 2001 for SRAM, and January 2003 to December 2005 for PSRAM.

Dwyer reports are "empirical evidence [that] shows that SRAM prices were artificially high during the class period" (*id*. at 21) and they cited this among other evidence that "raises a strong inference of Cypress' participation in the conspiracy" (*id*. at 20). In their Trial Brief, Plaintiffs make this claim explicitly: they assert that "the existence of a conspiracy is also supported by evidence that . . . SRAM prices were inflated." *Id*. at 2. In other words, Plaintiffs want to ask the jury to make the threshold determination under the Sherman Act and analogous state antitrust and consumer protection laws — that Cypress in fact was part of a conspiracy to fix prices — in part on the basis of the expert testimony of Drs. Levy and Dwyer that SRAM price levels were higher than predicted by market forces.

This testimony is directly contrary to the positions that *all of Plaintiffs' experts took* in their expert reports and depositions.

- DP expert Dr. Levy made it clear that no part of his work involved determining the existence of a conspiracy. He noted in his report that Plaintiffs had alleged a conspiracy, and stated that he "identified any impact *of the conspiracy*" by conducting an empirical analysis of prices during and outside the alleged conspiracy period. Levy Report at 4 (emphasis added). At deposition, Dr. Levy could not have been more clear: "Q. Do you have an opinion in this case as to whether there was a conspiracy among SRAM manufacturers? A. It's not part of my assignment to have an opinion about that." Levy Tr. 46:2-8. Indeed, Dr. Levy stated, "I *assume* that, as alleged in the complaint, that there was a price fixing conspiracy." *Id*. at 46:23-24 (emphasis added).
- IP expert Dr. Michael Harris nowhere states that the results of the empirical work showed the existence of the conspiracy, and when asked at deposition about regression models, he stated, "I don't think that those sorts of empirical models speak to the existence of conspiracies." Harris Tr. 176:19-21.
- IP expert Dr. Dwyer stated that his first task was to "measure the size and significance of overcharges to direct SRAM purchasers, arising from the alleged conspiracy. . . ." Dwyer Report at 1. At deposition, when asked "Did your assignment in

any way include determining whether conspiracy existed in this case?" Dr. Dwyer replied "No, it did not." Dwyer Tr. 15:12-14. Later, he explained that "the starting point for my analysis was to assume the conspiracy. . . ." *Id*. at 88:20-21.

Based on the above, it is clear that the two experts who actually conducted the empirical analysis — Drs. Levy and Dwyer — expressed no opinion that their findings of price inflation showed the existence of a conspiracy, but instead purported only to measure the effects of one if it existed. Nor did the liability experts, Drs. Noll and Harris, opine anywhere in their reports that the work of their companion experts showed a conspiracy. These assertions about the relevance of the regressions to Plaintiffs' case are extremely important, as they delineate for Cypress what kind of evidence they can and cannot expect to face on the central issue of the existence of a conspiracy. A claim that a conspiracy can be shown by evidence of systematic price inflation is fundamentally different from the other proof Plaintiffs offer, such as evidence of information exchanges and expert opinion about the import of those exchanges. That Plaintiffs' experts did not intend to opine that the regressions showed a conspiracy was critical to Cypress' trial preparation.

In light of these expert disclosures, Plaintiffs cannot now offer the testimony of any of their experts for the proposition that the existence of an SRAM conspiracy "is . . . supported by economic evidence that . . . SRAM prices were inflated." Pl. Trial Brief at 2. Rule 26(a)(2)(B)(i) requires that expert witnesses produce "a complete statement of all opinions the witness will express and the basis and reasons for them." There is a duty of supplementation under Rule 26(e)(1)(A) if a party "learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known" to other parties. A party that does not properly disclose part of an expert's opinion testimony under Rule 26(a) is prohibited from "us[ing] that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). As the Ninth Circuit has put it, "Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by

Rule 26(a) that is not properly disclosed." *Yeti By Molly, Ltd. v. Deckers Outdoor*, 259 F. 3d 1101, 1106 (9th Cir. 2001); *see also In re Oracle Corp. Secs. Litig.*, 2009 U.S. Dist. LEXIS 50995, at *84 (N.D. Cal. June 16, 2009) ("The expert report . . . defines the metes and bounds of an expert's trial testimony."). Plaintiffs did not reveal that any of their experts intended to testify that systematic price inflation, as shown through the regression analyses of Drs. Levy and Dwyer, was an indication that SRAM manufacturers had entered into a conspiracy. All that the experts said in their reports was that the empirical analyses *assumed* a conspiracy, and served the purpose of showing the conspiracy's alleged effects. The plain text of Rule 37(c) requires that any contrary opinions by Plaintiffs' experts, as well as argument of counsel, be excluded.

Plaintiffs could not carry their burden of showing that their failure to disclose is either justified or harmless. *See Yeti by Molly*, 259 F.3d at 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness."). Plaintiffs have known from the day this lawsuit was filed that the central element of their claim is the existence of a conspiracy to fix prices. Their liability experts, Drs. Noll and Harris, wrote lengthy and detailed reports addressed to that very issue, and their damages experts clearly had thought through the relationship between their empirical work and the showing of conspiracy when they explained that they had assumed the existence of a conspiracy. There is no conceivable justification for failing to disclose an opinion that price inflation as shown through the regression demonstrates the existence of a conspiracy. Nor is it harmless: having received Plaintiffs' expert reports, Cypress proceeded to depose those experts without any expectation that they would offer the regressions as evidence of the conspiracy. "The intent of [Rule 26] is to ensure that deposition testimony can proceed with parties already armed with the expert's report, so as to be able to evaluate the opinions to be offered." *Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003) (excluding supplemental expert report that contained new opinions). Based on the voluminous expert reports and reply reports, Cypress has understood for many months now that liability experts base their opinions on evidence *other than* the alleged price inflation, while the damages experts assume a conspiracy and then attempt to show that prices in fact were inflated. For

Plaintiffs now to be allowed to assert that the regression results show the existence of a conspiracy would unfairly prejudice Cypress by changing a central piece of Plaintiffs' proof.

V. MOTION TO EXCLUDE EVIDENCE OF CUSTOMER-VENDOR RELATIONSHIPS

Plaintiffs are seeking to introduce as evidence of collusion among SRAM manufacturers three documents that in fact reflect meetings between suppliers and *purchasers* of SRAM—not meetings between suppliers. These documents are misleading at first glance, because some of the companies purchasing SRAM also have divisions or affiliates that manufacture and sell SRAM. However, the documents and corresponding deposition testimony make clear that the meetings in question were simply customer–vendor exchanges pertaining to the procurement of SRAM. Because the probative value of these exchanges is minimal at best, and the potential to confuse and mislead the jury is substantial, the evidence should be excluded under Fed. R. Evid. 402 and 403.

Plaintiffs' Exhibit No. 214 pertains to Cypress's participation in a meeting at Samsung in Korea. Plaintiffs questioned Cypress's Pashu Gopalan in his deposition about the purpose of the meeting. He explained: "It was a trip to Korea to visit Samsung as well as other OEMs that made mobile handsets, including LG and Pantech. So the three Korean largest mobile companies are LG, Samsung, and Pantech. So this was the consortium visiting potential customers and pitching to them about CellularRAM." Gopalan Dep. 89:1-10. Similarly, Exhibit No. 215 references a cancelled "customer visit at MITSUBISHI" by Cypress's Tony Alvarez ("ARA"), and then goes on to discuss Mitsubishi's potential participation in the Cellular RAM consortium—an activity that Plaintiffs' own experts have recognized as procompetitive. *See, e.g.*, Noll Report 9; Harris Report 35 ¶ 92.

Plaintiffs' Exhibits 647 and 648 are a translated NEC document referencing monthly "meetings on price-matching with other manufacturers," including Cypress and Samsung.[10] NEC's Makoto Yamanaka testified that these meetings were in fact internal meetings between

[10] Cypress reserves the right to contest the accuracy of this translation.

NEC Corporation's material resources division—the "department that purchases components for NEC set products, such as cell phones or communication devices"—and NEC Electronics' own semiconductor division, which was responsible for "sales production and development of semiconductors." The semiconductor division was "spun off" from NEC Corporation, and "would then sell to the electronic equipment division of NEC." The relationship between these divisions "was that of a purchaser to a vendor." Once NEC's semiconductor division was spun off, that division was added to the list of vendors with which NEC's material resources division held regular procurement meetings. The "information exchanges" referenced were *internal* exchanges between NEC's purchasing and sales components. Mr. Yamanaka characterized the suggestion that multiple SRAM vendors would participate together in these meetings as "unthinkable," because "it's common sense that a purchaser would meet with the vendors separately since they want to negotiate the price." He further testified that NEC's material resources division did not share information obtained from other vendors with anyone at NEC Electronics. Yamanaka Dep. 199:8 – 207:9.

Given that purported information exchanges among competing SRAM manufacturers are the crux of Plaintiffs' case, the potential for these documents to be misconstrued as exchanges among manufacturers—rather than between consumers and vendors—presents a serious risk of confusing and misleading the jury. Accordingly, Cypress respectfully requests that the Court exclude evidence of these and other customer–vendor exchanges, including but not limited to Plaintiffs' Exhibit Nos. 214, 215, 647, and 648.

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Respectfully submitted,

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